



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 157 OF 2001

IN THE MATTER OF THE ESTATE OF M'MUGAMBI KATHARA alias MUGAMBI KATHARA (DECEASED)

IN THE MATTER OF PROTEST

BETWEEN

REGINA MUKOMBITI M'KAURA.....1st PROTESTOR

FAITH GACHERI M'MARETE.....2ND PROTESTOR

ELIZABETH KARAMBU M'MARETE.....3RD PROTESTOR

AND

M'MARETE M'MUGAMBI.....PETITIONER/RESPONDENT

AND

KIRIGIA MUONJA.....INTERESTED PARTY

RULING

BACKGROUND:

1. The deceased's estate comprised in of **LR. ABOTHUGUCHI/KITHIRUNE/20** was confirmed on 04th December, 2012 and distributed as shown in the certificate of grant issued on 11th December, 2012. The confirmation arose out of a consent between the Petitioner, the Objector and the 1st Protestor herein.
2. The certificate of confirmation of grant stated in part that 1.8 acres of **LR. ABOTHUGUCHI/KITHIRUNE/20** was distributed to the **Petitioner and the 1st Protestor on their own behalf and in trust for Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete(Minors) and Lucy Nkirote Marete.**
3. Subsequently, **LR. ABOTHUGUCHI/KITHIRUNE/20** was partitioned and **LR. ABOTHUGUCHI/KITHIRUNE/3151** was registered in the name of the Petitioner and the 1st Protestor in trust for Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete (Minors) and Lucy Nkirote Marete.
4. The Petitioner by summons dated and filed on 23rd November, 2015 applied to amend the grant by excluding the name of the 1st Protestor from deceased's beneficiaries. By her replying affidavit sworn on 03rd June, 2016, the 1st Protestor vehemently opposed the Petitioner's application to exclude her from the deceased's beneficiaries.
5. By a ruling dated 30.08.2017, the court dismissed the Petitioner's application dated and filed on 23rd November, 2015 in which he sought to exclude the name of the 1st Protestor, Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete(Minors) and Lucy Nkirote Marete from the deceased's beneficiaries on the ground that the estate had already been distributed.

6. Afterwards, deceased's daughter, one **TABITHA NKIROTE KIRIGIA (Interested Party)** moved the court by summons dated 15th May, 2019 seeking revocation of the grant confirmed on 04th December, 2012 on the grounds among others that she was disinherited.

7. The summons dated 15th May, 2019 was compromised by a consent between the Petitioner's advocates (**Mwenda, Mwarania, Akalu & Co. Advocates**) and Interested Party's advocates (**M/S Gichunge Muthuri & Co. Advocates**) filed on 11th July, 2019, in which it was agreed as follows:

i. The surviving children of M'MUGAMBI KATHARA alias MUGAMBI KATHARA (Deceased) are M'MARETE M'MUGAMBI, the Petitioner and TABITHA NKIROTE KIRIGIA, the Interested Party/Applicant

ii. The distribution of the estate confirmed on 04th December, 2012 which had sidelined the Interested Party/Applicant be reviewed and set aside.

iii. Upon these terms, the Applicant's application dated 15.05.19 be deemed as settled with no order as to costs

8. The Interested Party subsequently died and her husband **KIRIGIA MUONJA** applied to be substituted in her place which order was granted on 30th January, 2020.

9. On 05th February, 2020, Petitioner's advocates (**Mwenda, Mwarania, Akalu & Co. Advocates**) and Interested Party's advocates (**M/S Gichunge Muthuri & Co. Advocates**) filed a consent dated 31st January, 2020 in the following terms:

i. The share of the Petitioner in the distribution orders dated 04.12.2012 and comprised in LR. ABOTHUGUCHI/KITHIRUNE/3151 measuring 0.42 Hectares be altered to accommodate the interest of TABITHA NKIROTE KIRIGIA, the deceased Applicant through her legal representative KIRIGIA MUONJA

ii. The register in respect of LR. ABOTHUGUCHI/KITHIRUNE/3151 be rectified by cancelling entry numbers 2 and 3 in the proprietorship as the owner thereof and trustee for his own benefit and that of members of his nuclear family and issuing Title Deeds to that effect and be substituted with the names of M'MARETE M'MUGAMBI and KIRIGIA MUONJA as the new proprietors in common thereof holding undivided shares

iii. The rest of the earlier distribution to remain as per the confirmation and distribution orders of 04.12.2012

iv. As between the Petitioner and the Applicant, KIRIGIA MUONJA, each party do bear its own costs

10. REGINA MUKOMBITI M'IKAUURA (1st Protestor) on 12th March, 2020 filed a Protest by way of an affidavit of protest sworn on 12.03.2020 in which she avers that she is wife to the Petitioner with whom they have been blessed with two daughters **Faith Gacheri M'Marete** and **Elizabeth Karambu M'Marete**. She avers mainly that the consent dated 31st January, 2020 filed on 05th February, 2020 unlawfully expunged her name and those of her daughters from the deceased's beneficiaries.

11. In his affidavit of response sworn on 06th May, 2020 and filed on 21st July, 2020, **KIRIGIA MUONJA (Interested Party)** avers that he is not a party to the dispute between the Protestor and the Petitioner.

12. I have considered the Protest in the light of the court record as summarized hereinabove together with the submissions filed on behalf of the Protestors and the Interested Party.

13. The consent filed on 11th July, 2019, in which it was agreed in part that **the distribution of the estate confirmed on 04th December, 2012 which had sidelined the Interested Party/Applicant be reviewed and set aside** effectively gave room for inclusion of the interests of deceased's daughter **TABITHA NKIROTE KIRIGIA** (deceased) who is represented in this case by her husband **KIRIGIA MUONJA** by redistributing the estate afresh.

14. Indeed, the court on 15th July, 2019 directed the parties to file their respective modes of distribution of the estate. It is to be remembered as stated hereinabove that the court had by its ruling dated 30.08.2017 dismissed the Petitioner's application dated and filed on 23rd November, 2015 in which he sought to exclude the name of the 1st Protestor from the deceased's beneficiaries on the ground that the estate had already been distributed.

15. The consent dated 31st January, 2020 and filed on 05th February, 2020 by Petitioner's advocates (**Mwenda, Mwarania, Akalu & Co. Advocates**) and Interested Party's advocates (**M/S Gichunge Muthuri & Co. Advocates**) which stated in part that **The register in respect of LR. ABOTHUGUCHI/KITHIRUNE/3151 be rectified by cancelling entry numbers 2 and 3 in the proprietorship as the owner thereof and trustee for his own benefit and that of members of his nuclear family and issuing Title Deeds to that effect and be substituted with the names of M'MARETE M'MUGAMBI and KIRIGIA MUONJA as the new proprietors in common thereof holding undivided shares** mischievously and unlawfully excluded the 1st Protestors, Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete (Minors) and Lucy Nkirote Marete from the beneficiaries of deceased's estate by circumventing the court order dated 30.08.2017 in which the court declined the Petitioner's attempt to exclude the Protestors from beneficiaries of the deceased's estate.

16. The record demonstrates that 1st Protestor, Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu

Marete(Minors) and Lucy Nkirote Marete were not party to the consent which is clearly prejudicial to them.

17. Where a party contends that it has been condemned unheard, the courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision. In **Onyango V. Attorney General (1986-1989) EA 456, Nyarangi, JA** asserted at **page 459**:

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

18. At **page 460** the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

19. In **Mbaki& Others V. Macharia & Another (2005) 2 EA 206**, at page 210, the Court of Appeal stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

20. A consent judgment and the principles on which it can be set aside are now well settled. A consent judgment has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out (See the decision of the Court of Appeal in **J M Mwakio vs Kenya Commercial Bank Ltd, CA Nos 28 of 1982 and 69 of 1983**).

21. A consent judgment can be set aside if it was obtained by fraud or **collusion**. The material before the court demonstrates that the consent dated 31st January, 2020 and filed on 05th February, 2020 was made in collusion between the Petitioner and Interested Party to exclude 1st Protestors, Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete (Minors) and Lucy Nkirote Marete from the beneficiaries of deceased's estate and in circumvention of the court order dated 30.08.2017 in which the court dismissed the Petitioner's application dated and filed on 23rd November, 2015 in which he sought to exclude the name of the 1st Protestor.

22. This court appreciates the parties' position that **KIRIGIA MUONJA (Interested Party)** is entitled to benefit from deceased's estate in place of his wife **TABITHA NKIROTE KIRIGIA(deceased)**.

23. I have no doubt in my mind that the inclusion of **KIRIGIA MUONJA (Interested Party)** is possible without the Petitioner and the Interested Party unlawfully excluding the 1st Protestors, Joy Kawira Marete, Mary Kanya Marete, Faith Gacheri Marete, Elizabeth Karabu Marete (Minors) and Lucy Nkirote Marete from the deceased's beneficiaries without giving them an opportunity to be heard.

24. No doubt this is what the court had in mind when it on 15th July, 2019 directed the parties to file their respective modes of distribution of the estate.

25. From the foregoing, this court makes the following orders:

1) The Protest filed on 12th March, 2020 has merit and it is allowed as prayed.

2) The consent dated 31st January, 2020 and filed on 05th February, 2020 by Petitioner's advocates (Mwenda, Mwarania, Akalu & Co. Advocates) and Interested Party's advocates (M/S Gichunge Muthuri& Co. Advocates) which stated in part that The register in respect of LR. ABOHUGUCHI/KITHIRUNE/3151 be rectified by cancelling entry numbers 2 and 3 in the proprietorship as the owner thereof and trustee for his own benefit and that of members of his nuclear family and issuing Title Deeds to that effect and be substituted with the names of M'MARETE M'MUGAMBI and KIRIGIA MUONJA as the new proprietors in common thereof holding undivided shares is rejected in its entirety.

iv. The order in force is the one issued on 15th July, 2019 reviewing and setting aside the distribution of the estate confirmed on 04th December, 2012

v. Parties are hereby ordered to comply with the court order dated 15th July, 2019 that directed the parties to file their respective modes of distribution of the estate

3) Mention on 10th February, 2021 to confirm compliance of order (iv) above

DATED AT MERU THIS 15th DAY OF December, 2020

T. W. CHERERE

JUDGE

Court assistant - Morris Kinoti

For Petitioners - Mr. Muriira for Mwenda, Mwarania, Akalu & Co. Advocates

For Protestor - Mr. Gitonga for Basilio Gitonga, Muriithi & Associates

For Interested Party - Ms. Matiri for Gichunge Muthuri & Co. Advocates